Supreme Court
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(1) 96 531 OCT 4 1996

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No. _____

In The

Supreme Court of the United States

October Term, 1996

DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioner,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a liberty interest under the Due Process Clause of the Fourteenth Amendment to commit suicide and, if so, whether it includes an interest to receive the assistance of another to do so?

2. If the answer to the first question is in the affirmative, whether the "no set of circumstances" test described in *United States v. Salerno*, 481 U.S. 739 (1987), applies to a facial challenge to a state statute prohibiting assisted suicide?

3. If the answer to the first question is in the affirmative, and if the *Salerno* test does not apply, whether the undue burden standard described in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), or the balancing test employed by the Court in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), applies to determine whether respondent's asserted interests in suicide and assisted suicide have been violated?

4. Assuming *Cruzan's* balancing test applies, whether balancing asserted interests in suicide and assisted suicide against relevant state interests, respondent's constitutional rights are violated by California's absolute prohibition of assisted suicide?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner: Daniel E. Lungren, Attorney General of the State of California.

There were two other defendants in the District Court: Dixon Arnett, former Executive Director of the Medical Board of California, and the Medical Board of California; however, both were previously dismissed by the District Court and are not parties to this petition.

Respondent: John Doe, a resident of the State of California, who has been permitted by stipulation of the parties and order of the District Court to be identified in this case by pseudonym only.

Jack Kevorkian, a resident of the State of Michigan, was also a plaintiff in the case below; however, he was dismissed for lack of standing and is not a party to this petition.

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PETITION FOR WRIT OF CERTIORARI

Daniel E. Lungren, Attorney General of the State of California, respectfully petitions for a writ of certiorari, pursuant to Sup. Ct. Rule 11, to review the judgment of the United States District Court for the Central District of California in this case.

OPINIONS BELOW

The order of the United States District Court for the Central District of California was entered September 13, 1996. It is reported at ___ F.Supp. ___, 1996 WL 539534 (C.D. Cal. 1996), and is reproduced in the Appendix. App. at 1a-15a.

The Judgment of the District Court was entered on September 20, 1996. App. at 16a-17a.

JURISDICTION

The jurisdiction of the United States District Court for the Central District of California was found to exist pursuant to 28 U.S.C. § 1331.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. § 1291. A Notice of Appeal was filed by petitioner on September 25, 1996. App. at 22a-24a. That appeal was docketed in the Court of Appeals on October 2, 1996, and is pending at the present time. App. at 25a-26a. No judgment has been rendered in this case by the Court of Appeals.

This Court has jurisdiction to review the judgment of the United States District Court for the Central District of California under both 28 U.S.C. § 1254(1), and 28 U.S.C. § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . " U.S. Const. amend. XIV, § 1.

California Penal Code § 401 which provides that "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." Cal. Pen. Code, § 401.

STATEMENT OF THE CASE

Briefly, the facts relating to John Doe as found by the District Court are as follows:

> "John Doe is 35 years old and was first diagnosed as HIV positive in July, 1984. He was diagnosed as having AIDS on January 1, 1993. John Doe is in the advanced final stages of his disease and has been advised by his physician that his condition is terminal, though the exact amount of time left to him is necessarily an estimate. John Doe currently suffers from a T-cell count of 12 (normal being about 1000), leading to chronic fatigue. He also suffers from several as yet undiagnosed viruses which his immune system lacks the ability to defeat. Recently, John Doe has been diagnosed as suffering from cytomegalovirus retinitis and has a catheter in his right arm for its treatment. However, this is a progressive degenerative disease of the optic nerve and will eventually destroy [Doe's] eyesight, preventing him from practicing his profession as a video editor.
>
> "John Doe is mentally competent and aware of the nature of his diseases and likely progress. In addition, John Doe contends that he has 'seen his peers die without dignity and in horrible pain, and he does not want that fate to befall him.' [citation omitted] John Doe wishes to obtain physician aid in dying." App. at 2a.

On October 27, 1994, John Doe filed a First Amended Complaint[1] in this case claiming, *inter alia*, that § 401 is

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[1] This case originally began on September 7, 1994, with a complaint for injunctive and declaratory relief filed by Jack Kevorkian in which he claimed, *inter alia*, that § 401 is unconstitutional on its face because it

unconstitutional on its face because, by prohibiting assisted suicide, it violates his right to privacy and equal protection under both the California and United States Constitutions.[2] On cross-motions for summary judgment, the District Court held that the right to privacy under Article I, Section 1, of the California Constitution does not include a right to assisted suicide and, further, that California Penal Code § 401 does not deny equal protection of the laws as guaranteed by the California Constitution. App. at 13a-15a.

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violates the Due Process Clause of the Fourteenth Amendment. Kevorkian also sought to challenge the earlier revocation of his California Physician's and Surgeon's Certificate by the Medical Board of California. However, relying on the line of cases beginning with *Younger v. Harris*, 401 U.S. 37 (1971), the District Court abstained from considering any of Kevorkian's constitutional challenges to laws under which the Medical Board of California acted when it revoked his medical license and, accordingly, dismissed those claims. Thereafter, the District Court, ruling on the parties' cross-motions for summary judgment, dismissed Kevorkian for lack of standing. App. at 4a-6a and 15a. He is not a party to this petition.

[2] The District Court found that, in addition to his privacy claim, Doe had also alleged a *liberty* interest claim under the Fourteenth Amendment to receive an assisted suicide. Ruling on petitioner's earlier motion to dismiss, the District Court dismissed Doe's liberty interest claim, citing the decision of the three-member panel in *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995) (hereinafter "*Compassion in Dying I*"), as binding precedent. At the same time, however, the District Court found that Doe's right to *privacy* under the Federal Constitution was "implicated" by § 401 and therefore denied petitioner's motion to dismiss that claim. However, after submission of the parties' cross-motions for summary judgment in the District Court, the Ninth Circuit issued its new *en banc* opinion in *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996) (hereinafter "*Compassion in Dying II*"), which superseded *Compassion in Dying I*. Ruling on the parties' cross-motions for summary judgment, the District Court stated that, upon further reconsideration of the Ninth Circuit's new *en banc* opinion, it had "determine[d] that the relevant constitutional inquiry is whether [Doe's] due process *liberty* interest is violated." App. at 8a, n.3. The District Court granted Doe leave to amend his complaint to conform to that change. *Id.*

In considering Doe's federal substantive due process claim, the District Court framed the question presented as follows:

> "This Court has been asked to determine whether there is a constitutional right to assisted suicide found under the liberty interest of the Due Process Clause of the Federal Constitution and whether that right is 'facially' violated by Cal. Penal Code § 401."[3] App. at 8a, footnotes omitted.

Relying on the Ninth Circuit's *en banc* opinion in *Compassion in Dying II*, 79 F.3d 790, 816 (9th Cir. 1996), the District Court first stated that there is "a protected Fourteenth Amendment liberty interest in controlling the time and manner of one's death." App. at 9a, internal quotations omitted. The District Court then held that the "no set of circumstances" test described in *United States v. Salerno*, 481 U.S. 739 (1987), did not apply to Doe's facial challenge to California Penal Code § 401. App. at 9a-11a. Rather than applying the *Salerno* test, the District Court held that "[g]iven the similarity between the liberty interests in abortion and assisted suicide, the test announced in *Casey* more closely addresses the constitutional question at issue." App. at 11a. Finally, the District Court held that:

> "Applying . . . [the undue burden] standard, it is clear that Cal. Penal Code § 401 places a 'substantial obstacle' in a 'large fraction of the cases' in which the section is relevant. This conclusion is readily apparent by the fact that § 401 does not merely place some restrictions on the right to assisted suicide, but *categorically prohibits all such conduct*. Accordingly, this Court finds that Cal. Penal Code § 401 violates the Due Process Clause of the Federal Constitution." App. at 11a; emphasis original.

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[3] In the footnote following the word " 'facially' ", the District Court stated that "[Doe] does not challenge the statute 'as applied.' " App. at 8a, n.2.

On September 20, 1996, the District Court entered judgment in Doe's favor, declaring "section 401 unconstitutional on its face because it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[4] App. at 16a. The District Court ordered enforcement of its judgment stayed until the conclusion of appellate proceedings in the Ninth Circuit and/or review by this Court.[5] App. at 19a-21a. A Notice of Appeal was filed in the case by petitioner on September 25, 1996, (App. at 22a-24a) and docketed in the Court of Appeals on October 2, 1996.[6] App. at 25a-26a.

REASONS FOR GRANTING THE WRIT

California Penal Code § 401, which prohibits aiding, advising, or encouraging another to commit suicide, was first enacted in 1873. It is an absolute prohibition, there are no exceptions. In November of 1992, the people of the State of California rejected an initiative ballot measure which would

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[4] The District Court declined, however, to render an opinion "at this time" on Doe's federal equal protection claim, noting that the Ninth Circuit had declined to address the parties' equal protection claims in *Compassion in Dying II*, 79 F.3d 790, 838 (9th Cir. 1996), and that "two district courts within the Ninth Circuit have analyzed the equal protection issue in the assisted-suicide context and rendered contradictory rulings. [citations omitted]" App. at 11a-12a. The District Court concluded that "[g]iven the volatility and complexity of these constitutional issues and the fact that the Ninth Circuit has recently heard oral argument in the appeal of *Lee v. State of Oregon*, 891 F.Supp. 1429 (D. Or. 1995), [further citation omitted], this Court declines to contribute to the growing confusion in this area of law in the Ninth Circuit and awaits guidance from the Circuit." App. at 12a.

[5] However, the stay order also provides that "[n]othing herein shall be construed as a waiver by plaintiff John Doe of his right to apply to this Court in the future for relief from this stay order in the event that circumstances so require." App. at 20a.

[6] In the District Court, petitioner claimed Eleventh Amendment immunity under *Ex parte Young*, 209 U.S. 123 (1908). If certiorari is granted, petitioner will not challenge the District Court's ruling that Eleventh Amendment immunity does not apply in this case.

have created an exception to § 401 by authorizing physicians to provide "aid-in-dying" to terminally ill patients.[7] On September 20, 1996, § 401 was declared unconstitutional on its face and struck down in its entirety by the District Court. App. at 16a. Unless that judgment is reversed, California will be stripped of its sovereign power to prohibit assisted suicide and, at the same time, the people will be forced by judicial order to accept a public policy which they specifically rejected in 1992.

In view of the sweeping consequences of the District Court's judgment, and the opinion of the Ninth Circuit in *Compassion in Dying II* upon which it relied, this case is clearly of such imperative public importance that it requires immediate settlement in this Court. Sup. Ct. Rule 11. This Court has exercised its power to grant certiorari before judgment in the court of appeals where, as here, the case is of great constitutional significance[8] and extraordinary national

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[7] Proposition 161, the "Physician-Assisted Death" initiative, would have authorized physicians to provide "aid-in-dying" to terminally ill patients. "Aid-in-dying" was defined therein as "a medical procedure that will terminate the life of the qualified patient in a painless, humane and dignified manner whether administered by the physician at the patient's choice or direction or whether the physician provides means to the patient for self-administration." If accepted by California voters, Proposition 161 would have thus legalized both assisted suicide and euthanasia, *albeit* in limited circumstances. However, Proposition 161 was rejected by the voters and, thus, never became law in California.

[8] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the steel seizure case; certiorari granted before judgment although case was in preliminary injunction state); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (question of whether President and Congress had constitutional authority to take United States off gold standard; certiorari granted, 293 U.S. 548 (1934), so that case could be decided with *Norman v. Baltimore and Ohio Railroad Co.*, 293 U.S. 546 (1934), in which certiorari had previously been granted to review judgment of New York Court of Appeals); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) (constitutionality of Railroad Retirement Act); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (constitutionality of the Agricultural Adjustment Act; certiorari granted at 296 U.S. 569 (1935).

importance.[9] Certiorari before judgment is particularly appropriate where, as here, a similar or identical question of constitutional importance is already before the Court in another case.[10] Finally, certiorari before judgment is particularly appropriate where, as here, petitioner's appeal is pending in the *same* court of appeals which issued the controlling authority, *Compassion in Dying II*, now pending in this Court.[11]

Of all the assisted-suicide cases presently before this Court, the instant case is the *only* case in which: (1) a patient is asserting his own rights; (2) that patient has challenged a state statute prohibiting assisted suicide on its face only; and

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[9] *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("imperative public importance" and "disarray among the Federal District Courts" over constitutionality of sentencing guidelines statute); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (issues arising out of presidential actions to secure release of hostages held by Iran "are of great significance and demand prompt resolution"); *United States v. Nixon*, 418 U.S. 683, 686-687 (1974) ("public importance of the [presidential confidentiality] issues presented and the need for their prompt resolution"); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947) (issues arising out of nationwide coal strike); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942) ("public importance" of issues involved in wartime court martial of enemy saboteurs, plus public interest that requires Court decision without "any avoidable delay").

[10] Certiorari has been granted in *State of Washington v. Glucksberg*, Docket No. 96-110, and *Vacco v. Quill*, Docket No. 95-1858, both of which raise similar or identical questions of constitutional importance as the instant case. *Cf. Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (taking judicial notice of *Bolling v. Sharpe* then pending in the court of appeals and inviting filing of petition for certiorari before judgment in order to consider constitutional issues similar to those in other pending cases; certiorari granted, *Bolling v. Sharpe*, 344 U.S. 873 (1952).

[11] *Cf. Taylor v. McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959) (certiorari granted before judgment because of the pendency in the Supreme Court of *Greene v. McElroy*, 360 U.S. 474 (1959), which involved essentially the same important constitutional issues, and since *Taylor* was then pending in the *same* court of appeals which had decided the *Greene* case, and it was considered likely that *Taylor* would be disposed of by the court of appeals on the authority of its earlier *Greene* decision).

(3) the state statute at issue has been declared unconstitutional on its face and struck down in its entirety. In view of the District Court's judgment, and the opinion of the Ninth Circuit in *Compassion in Dying II* upon which it relied, it would be futile for the California Legislature to attempt to enact a new statute prohibiting certain forms of assisted suicide in the absence of clear directions from this Court as to whether the States can prohibit assisted suicide at all.

In finding a protected liberty interest to commit suicide and assisted suicide, the District Court relied on the Ninth Circuit's opinion in *Compassion in Dying II*, 79 F.3d 790 (9th Cir. 1996). App. at 9a. However, as discussed in Section I, below, that opinion squarely conflicts with recent decisions of both the Second Circuit and the Michigan Supreme Court. Furthermore, the constitutional analysis utilized by the Ninth Circuit in *Compassion in Dying II* was both fundamentally flawed in numerous respects and clearly inconsistent with Supreme Court precedent.

The District Court also declined to apply the "no set of circumstances" test described by this Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), to Doe's facial challenge to § 401. App. at 9a-11a. *Salerno* requires that, in order to prevail, such a challenger must "establish that no set of circumstances exists under which the [legislative] Act would be valid." *Id.* In declining to follow *Salerno*, the District Court relied upon a law review article, and recent statements by the Ninth Circuit in *Compassion in Dying II* that " 'the *Salerno* test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition of assisted suicide.' " App. at 9a-10a, further citation omitted. However, both the decision of the District Court, and the Ninth Circuit's recent statements regarding *Salerno*, squarely conflict with recent decisions of this Court, and with decisions of several circuit courts of appeal. Moreover, as discussed in Section II, below, other circuit courts continue to regularly apply the *Salerno* test, and its application often prevents facial challenges from succeeding. Indeed, had *Salerno* been applied herein, Doe's facial challenge clearly would have failed. Neither the States nor the courts should

have to guess whether *Salerno* continues to represent the Law of the Land or, as some have suggested, it is now nothing more than a dead letter.

Finally, instead of applying the *Salerno* test to Doe's facial challenge, the District Court applied the undue burden standard announced in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), because, in the view of the District Court, it "more closely addresses the constitutional question at issue." App. at 11a. However, as discussed in Section III, below, the undue burden standard has no application outside the abortion context and, further, is not designed for application to statutes which prohibit, as opposed to regulate, particular conduct. The District Court's application of *Casey's* undue burden standard also plainly conflicts with the holding of this Court in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990), that " 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.' [citations omitted]" By employing *Casey's* undue burden standard, rather than balancing as required by *Cruzan*, the District Court invalidated § 401 on its face without ***any*** consideration whatsoever of the relevant state interests furthered by the statute. For these reasons, and those discussed below, certiorari should be granted to immediately resolve these issues of great constitutional significance, and imperative public importance, both to the State of California and the Nation as a whole.

I. Certiorari Should be Granted to Review the Judgment of the District Court, and the Opinion of the Ninth Circuit Upon Which it Relied, Declaring the Existence of A New Liberty Interest to Commit Suicide and Assisted Suicide

1. The Judgment of the District Court, and the Opinion of the Ninth Circuit in *Compassion in Dying II* Upon Which It Relied, Conflict with Decisions of Numerous Other Courts Which Have Addressed the Same Issue

After a contentious history and much disagreement, *Compassion in Dying II* is now the law of the Ninth

Circuit.[12] Accordingly, the District Court relied upon that opinion when finding a protected liberty interest to commit suicide and assisted suicide. App. at 9a. The decision of the District Court thus suffers from the *same* fundamental flaws as *Compassion in Dying II* which, in addition to being constitutionally unsound, squarely conflicts with decisions of other courts which have addressed the identical issue.

In *Compassion in Dying II*, 79 F.3d at 793, the Ninth Circuit announced its discovery of a new "constitutionally-protected liberty interest in determining the time and manner of one's own death . . . " That decision is in direct conflict with the Second Circuit's recent holding in *Quill v. Vacco* that:

> "The right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of terminal illness, seek the right to hasten death. We therefore decline the plaintiffs' invitation to identify a new fundamental right, in the absence of a clear direction from the Court whose precedents we are bound to follow."[13]

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[12] In *Compassion in Dying II*, 79 F.3d 790, 793-794 (9th Cir. 1996), an eleven-judge *en banc* panel vacated the previous decision of the three-judge panel in *Compassion in Dying I*, 49 F.3d 586 (9th Cir. 1995), which had voted 2-1 to reverse the district court decision, 850 F.Supp. 1454 (W.D. Wash. 1994). After *Compassion in Dying II* was issued, an active judge *sua sponte* requested that the full court *en banc* rehear the case, however, that request failed to receive a majority of the votes of the non-recused active judges and was rejected. Dissenting opinions from the order rejecting the request for rehearing were filed by Circuit Judges O'Scannlain and Trott and are reported at 85 F.3d 1440 (9th Cir. 1996).

[13] *Quill v. Vacco*, 80 F.3d 716, 724-725 (2d Cir. 1996). While the Second Circuit rejected the claim that there is a liberty interest in assisted suicide under the Due Process Clause of the Fourteenth Amendment (80 F.3d 716, 723-725), it did invalidate New York's prohibition of assisted suicide on equal protection grounds finding that New York's prohibition did not further, and thus was not rationally related to, any legitimate state interest. *Quill*, 80 F.3d at 725-731.

The Ninth Circuit's opinion also squarely conflicts with the recent decision of the Michigan Supreme Court in *People v. Kevorkian* where, on the identical substantive due process issue, the Court held that:

> "On the basis of the foregoing analysis, we would hold that the right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause."[14]

Like its holding, the rationale utilized by the Ninth Circuit also creates numerous conflicts. In *Compassion in Dying II*, the Ninth Circuit found no difference between the withdrawal of life support, on the one hand, and the act of suicide, on the other. *Compassion in Dying II*, 79 F.3d at 821-824. However, "those courts that have found a right to refuse to begin or to continue life-sustaining medical treatment have done so only after concluding that such refusal is wholly

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[14] *People v. Kevorkian*, 447 Mich. 436, 481, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). The Ninth Circuit's opinion also conflicts with the holding of the California Court of Appeals in *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992), wherein the court considered whether a terminally ill individual's constitutional rights to privacy and to refuse medical treatment under the United States and California Constitutions included a right to an assisted suicide. After balancing Donaldson's interests against those of the State, the court concluded that he had "no constitutional right to a state-assisted death." *Donaldson*, 2 Cal.App.4th at 1623. While the court in *Donaldson* considered whether a right to an assisted suicide was encompassed by a generalized constitutional right of privacy, this issue, like the issue in *Cruzan*, "is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 n.7 (1990).

different from the act of suicide."[15] Numerous state legislatures have likewise recognized this fundamental distinction.[16] Finally, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), this Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" but, at the same time, recognized Missouri's important interest in the protection and preservation of human life, noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan*, 497 U.S. at 279-280 (footnote omitted, insert added). As Circuit Judge Noonan has astutely observed, "[w]hatever difficulty the district court [and likewise the *en banc* panel in *Compassion in Dying II*] experienced in distinguishing one situation from the other, it was not experienced by the majority in *Cruzan*." *Compassion in Dying I*, 49 F.3d 586, 591 (9th Cir. 1995) (insert added),

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[15] *People v. Kevorkian*, 447 Mich. 436, 480, 527 N.W.2d 714, 732 (1994) (footnote omitted), *cert. denied*, 115 S.Ct. 1795 (1995). *See, e.g., Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 627 (1982) ("essential dissimilarity" between right to decline medical treatment and any right to end one's life); *In re Conroy*, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985); *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1145, 225 Cal.Rptr. 297, 306 (1986); *Bartling v. Superior Court*, 163 Cal.App.3d 186, 196, 209 Cal.Rptr. 220, 225-226 (1984); *People v. Adams*, 216 Cal.App.3d 1431, 1440, 265 Cal.Rptr. 568, 573-574 (1990); *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992) and cases cited therein; *Thor v. Superior Court*, 5 Cal.4th 725, 742, 21 Cal.Rptr.2d 357, 367-368 (1993); and *DeGrella v. Elston*, 858 S.W.2d 698, 706-707 (Ky. 1993). *Cf. In re Quinlan*, 70 N.J. 10, 51-52 and n.9, 355 A.2d 647, 669-670 and n.9 (neither attempted nor aiding suicide implicated in circumstances similar to those presented), *cert. denied*, 429 U.S. 922 (1976). *See also* Thomas J. Marzen, *et al.*, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 10 n.34 (1985), and cases cited therein.

[16] *See* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, 799, 806 n.25 (1994) ("legislatures that have codified the right to refuse treatment in the same legislation reject any affirmative act to end life."), *citing* natural death/living will statutes of forty States.

superseded by 79 F.3d 790 (9th 1996). These conflicts, involving an issue of such exceptional and profound nationwide importance, can only be resolved – indeed, must be resolved – by the final authoritative voice of this Court.

2. The Constitutional Analysis Utilized by the Ninth Circuit in *Compassion in Dying II* was Fundamentally Flawed

The threshold issue presented in this case is whether there is a liberty interest under the Due Process Clause of the Fourteenth Amendment to commit suicide and, if so, whether it includes an interest to receive the assistance of another to do so. Resolution of this issue, like all substantive due process adjudication, must begin with a recognition of the "great resistance" identified by this Court to expansion of the substantive content of the Due Process Clause. *Bowers v. Hardwick*, 478 U.S. 186, 194-195 (1986). "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* This Court recently reaffirmed that "great resistance" in *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), declaring that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. [citation omitted]"

In the perilous waters of substantive due process adjudication, a carefully focused approach helps to eliminate the irrelevant, illuminate the pertinent, and insure that the discovery of new rights is "much more than the imposition of the Justices' own choice of values on the States and Federal Government, . . . " *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Indeed, this Court has made clear that " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' " *Reno v. Flores*, 507 U.S.

292, 302 (1993) (citations omitted). Thus, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court carefully focused on the specific conduct at issue when it framed the question presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Bowers*, 478 U.S. at 190. The focus of the Court's inquiry was not whether one has a right to engage sexual conduct of one's choice but, rather, whether the specific conduct at issue, *i.e.*, homosexual sodomy, was entitled to constitutional protection.

Likewise, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), this Court carefully focused on whether Nancy Cruzan had "a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under [her] circumstances." *Cruzan*, 497 U.S. at 269 (insert added). This carefully focused approach allowed the Court to first identify the specific conduct at issue (*i.e.*, the withdrawal or withholding of unwanted medical treatment), and then the relevant historical traditions (*i.e.*, the doctrines of informed consent and bodily integrity) protecting or denying protection to that conduct. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 127-128 n.6 (1989) (Scalia, J.).

Rather than carefully focusing on suicide and assisted suicide, the Ninth Circuit broadly framed the question presented as "whether there is a liberty interest in determining the time and manner of one's death." *Compassion in Dying II*, 79 F.3d at 800. By doing so, it opened the door to consideration of a host of activities which are wholly dissimilar from suicide and which plainly involve different considerations. Indeed, even the Ninth Circuit acknowledged that "[t]he liberty interest we examine encompasses a whole range of acts that are generally not considered to constitute 'suicide.' " *Compassion in Dying II*, 79 F.3d at 802.

In sharp contrast to the Ninth Circuit's broad approach, other courts which have considered this identical question have utilized a carefully focused approach consistent with the

precedents of this Court.[17] The Ninth Circuit's rationale for broadly framing the question presented was its belief that "it is the end and not the means that defines the liberty interest." *Compassion in Dying II*, 79 F.3d at 801. If true, however, the issues framed by this Court in both *Bowers* and *Cruzan* were far too narrow. Rather, under the Ninth Circuit's new "end-result" standard for defining liberty interests, the issue in *Bowers* should have been "whether there is a liberty interest in sexual pleasure" and, in *Cruzan*, "whether there is a liberty interest to determine the time and manner of one's death." In short, the Ninth Circuit's new "end-result" standard is entirely inconsistent with the precedents of this Court. It is also inimical to those principles of federalism which underlie that "great resistance" to expansion of the substantive content of the Due Process Clause.

3. The Due Process Clause of the Fourteenth Amendment Does Not Encompass A Liberty Interest To Commit Suicide Or To Receive the Assistance of Another to Do So

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law; . . . " U.S. Const. amend. XIV, § 1. Nowhere in the plain language of the Clause is an interest in committing suicide or assisted suicide expressly granted. Nor does the *design* of the Clause support any such contention.[18] The design of the Clause establishes

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[17] *See, e.g., Quill*, 80 F.3d at 723 (Second Circuit carefully focusing on plaintiffs' argument "for a right to assisted suicide as a fundamental liberty under the substantive component of the Due Process Clause of the Fourteenth Amendment.") and *People v. Kevorkian*, 447 Mich. 436, 464, 527 N.W.2d 714, 724 (1994) (Michigan Supreme Court carefully focusing its inquiry on "whether the [Due Process Clause] encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance."), *cert. denied*, 115 S.Ct. 1795 (1995).

[18] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no

life as the first interest to be accorded substantive and procedural protection, liberty the second, and property the third. The reason for this design is manifest: without life, liberty cannot exist and property cannot be acquired. Any finding of a "liberty" interest to extinguish the life of a "person" inverts the order and is directly contradicted by, and inconsistent with, the design of the Clause itself.[19] Unsupported by the plain language of the Clause and antithetical to its design, there must necessarily be a strong presumption against the contention that such an interest can nevertheless be implied in the substantive content of the Clause itself.[20]

This Court has established the principles to be used by the Judiciary when identifying "rights that have little or no textual support in the constitutional language." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (further citation omitted). In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court said that this category includes those fundamental liberties which are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed. [citation omitted]" In *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion by Powell, J.), they are characterized as those liberties which are "deeply rooted in this Nation's history and tradition. [footnote omitted]" *See also Bowers*, 478 U.S. at 191-192.

In approaching an historical analysis to determine whether a particular practice has been accepted by our people,

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cognizable roots in the language *or design* of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (emphasis added).

[19] *See* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, (1994) at p. 807. Of course, this conflict was not presented in the abortion context since, under *Roe*, "the word 'person,' as used in the Fourteenth Amendment does not include the unborn. [footnote omitted]." *Roe v. Wade*, 410 U.S. 113, 158 (1973).

[20] Individual interests are not afforded any less protection simply because the government, rather than the individual, is defending them. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 n.10 (1990).

it is important to remember that it is *this* Nation's history and tradition which is dispositive. *Cf. Bowers*, 478 U.S. at 191-194. An analysis, such as that engaged in by the Ninth Circuit in *Compassion in Dying II*, which centers primarily on "ancient attitudes" having little, if any, relevance to America's historical and traditional treatment of suicide and assisted suicide cannot establish that such practices have been accepted by our Nation. *Cf. Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

Opposition to suicide is deeply rooted in *this* Nation's history and tradition. "At common law suicide was a felony, punished by forfeiture of property to the king and ignominious burial. Essentially, suicide was considered a form of murder." *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citations omitted). While no State has a statute imposing criminal penalties for a successful suicide,

> "abolition of such 'punishments' as ignominious burial for suicide and then the decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a 'human right' or even because it was no longer considered reprehensible. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those who committed or attempted to commit the act were thought to be prompted by mental illness."[21]

In the United States, suicide continues " 'to be considered an expression of mental illness.' "[22] Indeed, the New York State Task Force on Life and the Law found that

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[21] Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 Hastings Center Report, No. 3, 32 (1993) (footnote omitted). See also *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 294-295 (1990) (Scalia, J., concurring).

[22] *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citation omitted). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1624, 4 Cal.Rptr.2d 59, 64 (1992).

"[s]tudies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death."[23] "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnotes omitted), *cert. denied*, 115 S.Ct. 1795 (1995). Simply stated, as Justice Scalia pointed out in his concurring opinion in *Cruzan*, "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' "[24]

Logically, if there is no liberty interest to commit suicide, there can be no liberty interest in receiving the assistance of another to do so. *People v. Kevorkian*, 447 Mich. 436, 468 n.35, 527 N.W.2d 714, 726 n.35 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). However, an independent analysis of the issue provides even more evidence that no such derivative interest exists. At common law, a person who assisted another to commit suicide was guilty of murder. *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983).

> "At the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a common-law offense." *People v. Kevorkian*, 447 Mich. 436, 478, 527 N.W.2d 714, 731 (1994) (citation omitted), *cert. denied*, 115 S.Ct. 1795 (1995).

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[23] New York State Task Force Report, *When Death is Sought – Assisted Suicide and Euthanasia in the Medical Context* (hereinafter "*New York State Task Force Report*") (May 1994) at 11.

[24] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 295 (1990) (Scalia, J., concurring) (citation omitted). *See also* Thomas J. Marzen, *et al.*, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. (1985), at 100 (reaching identical conclusion); and *New York State Task Force Report*, at 54-63 and 67-75.

Today, while a few states continue to classify assisted suicide as murder or manslaughter, "the predominant statutory scheme is to create a sui generis crime of aiding and abetting suicide." *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983). At least forty States, Puerto Rico and the Virgin Islands, impose criminal penalties on those who assist another to commit suicide.[25] Against this background, the contention that assisted suicide is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is entirely devoid of merit. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986).

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[25] The following states and territories have statutes which impose criminal penalties for aiding, assisting, causing, or promoting suicide: Alaska Stat., § 11.41.120(a)(2); Ariz. Rev. Stat. Ann., § 13-1103(A)(3); Ark. Stat. Ann., § 5-10-104(a)(2); Cal. Pen. Code, § 401; Colo. Rev. Stat., § 18-3-104(1)(b); Conn. Gen. Stat., § 53a-56(a)(2); Del. Code Ann., tit. 11, § 645; Fla. Stat. Ann., § 782.08; Ga. Code Ann. § 16-5-5(b); Ill. Comp. Stat. ch. 720, 5/12-31; Ind. Stat. Ann., § 35-42-1-2.5(b); Iowa Code, §§ 707A.1, 707A.2 and 707A.3, as amended by Acts of the 76th General Assembly, 1996 Session; Kan. Stat. Ann., § 21-3406; Ky. Rev. Stat., § 216:302; La. Rev. Stat., § 14:32.12; Me. Rev. Stat. Ann., tit. 17-A, § 204; Minn. Stat. Ann., § 609.215; Miss. Code Ann., § 97-3-49; Mo. Ann. Stat., § 565.023(1)(2); Mont. Code Ann., § 45-5-105; Neb. Rev. Stat., § 28-307; N.H. Rev. Stat. Ann., § 630:4; N.J. Stat. Ann., § 2C:11-6; N.M. Stat. Ann., § 30-2-4; N.Y. Penal Law, §§ 120.30, 125.15(3); N.D. Cent. Code, § 12.1-16-04; Okla. Stat. Ann., tit. 21, §§ 813-818; 18 Pa. Cons. Stat. Ann., § 2505; P.R. Laws Ann., tit. 33, § 4009; S.D. Codified Laws Ann., § 22-16-37; Tenn. Code Ann., § 39-13-216; Tex. Penal Code Ann., § 22.08; V.I. Code Ann., tit. 14, § 2141; Wash. Rev. Code Ann., § 9A.36.060; and Wis. Stat. Ann., § 940.12. The following states have statutes which impose criminal penalties for negligent homicide which are broad enough to encompass aiding, assisting, causing or promoting suicide: Ala. Code, § 13A-6-1; and Wyo. Stat., § 6-2-107. The following states impose criminal penalties by case law for assisting a suicide: *Commonwealth v. Mink*, 123 Mass. 422, 428-429 (1877); *People v. Kevorkian*, 447 Mich. 436, 493-497, 527 N.W.2d 714, 738-739 (1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); *State v. Jones*, 86 S.C. 17, 22, 47, 67 S.E. 160, 162, 165 (1910); and *State v. Willis*, 255 N.C. 473, 477, 121 S.E.2d 854, 856-857 (1961).

4. The Ninth Circuit's Reliance on *Casey* and *Cruzan* in Declaring the Existence of New Liberty Interests in Suicide and Assisted Suicide Was Entirely Misplaced

Neither *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), support the Ninth Circuit's discovery of new liberty interests to commit suicide and assisted suicide. In *Casey*, the Court was not called upon to decide whether some newly asserted liberty interest to choose an abortion was entitled to constitutional protection. Rather, the primary question presented was whether the fundamental holding of *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled. *Casey*, 505 U.S. at 844-846. Thus, the Court had no reason to discuss, and did not discuss, the well-established principles for construing the substantive content of the Due Process Clause.

Notwithstanding this fact, the Ninth Circuit found *Casey* to be "highly instructive and almost prescriptive for determining what liberty interest may inhere in a terminally ill person's choice to commit suicide." *Compassion in Dying II*, 79 F.3d at 813 (citation and internal quotes omitted). This was error. Contrary to the Ninth Circuit's reasoning, the three sentences in *Casey* it relied upon – broad generalities on the nature of the liberty protected by the Fourteenth Amendment – did not establish some new standard for construing the substantive content of the Due Process Clause. *Compassion in Dying II*, 79 F.3d at 813, *quoting Casey*, 505 U.S. at 851. *See also* App. at 9a (District Court relying on Ninth Circuit's interpretation of this portion of *Casey*). If allowed to stand, the Ninth Circuit's interpretation of these three sentences would virtually eliminate any "guideposts for responsible decisionmaking in this unchartered area" (*Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) since many activities which are plainly not entitled to constitutional protection can nevertheless be characterized as "intimate", "personal" or involving "choices central to personal dignity and autonomy".

The Ninth Circuit's reliance on *Casey* was also predicated on the mistaken notion that simply because a decision

may involve "choices central to personal dignity and autonomy", one is free to do whatever one wants with one's body. However, this is precisely the sort of "unlimited right to do with one's body as one pleases" which this Court has consistently and soundly rejected. *See Roe v. Wade*, 410 U.S. 113, 154 (1973); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973), *citing*, *inter alia*, constitutionally unchallenged laws against suicide. The Ninth Circuit's reliance on *Casey* also ignores the fundamental differences between abortion and suicide. This Court has held that abortion does not extinguish the life of a "person" in the context of the Fourteenth Amendment.[26] Certainly, it cannot be denied that suicide does. Under *Roe*, abortion concerns the choice of a woman, the decision-maker, to live her life without the dangers and unwanted conditions associated with pregnancy.[27] Suicide, on the other hand, is about death, *i.e.*, the death of the decision-maker. As Justice O'Connor observed in her opinion in *Casey*, "[a]bortion is a unique act" and "the liberty interest of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. In short, it is error to seek to discover new constitutional rights to commit suicide and assisted suicide by analogizing to the unique abortion rights jurisprudence. There is simply no indication in *Casey*, or the precedent from which it evolved, of an intention to expand the liberty interests previously identified by this Court in the manner utilized by the Ninth Circuit.

Nor does this Court's decision in *Cruzan* support the Ninth Circuit's discovery of new liberty interests to commit

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[26] *Roe v. Wade*, 410 U.S. 113, 158 (1973) (" . . . the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. [footnote omitted]"). While not a "person," it is of course well-settled that States have "legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846.

[27] *Roe v. Wade*, 410 U.S. 113, 153 (1973) (listing factors a woman and her physician would necessarily consider when considering an abortion).

suicide and assisted suicide. In *Cruzan*, this Court observed that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan*, 497 U.S. at 278. Later in the opinion, the Court stated that "*for purposes of this case*, we *assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*, 497 U.S. at 279 (emphasis added). Careful examination of this portion of the *Cruzan* opinion reveals two critical points. First, the Court *assumed*, but did not expressly hold, that there is a constitutionally protected interest to refuse life-sustaining medical treatment. Second, this assumption was expressly limited to the *Cruzan* case. Notwithstanding this clear language, the Ninth Circuit read *Cruzan* as "necessarily recogniz[ing] a liberty interest in hastening one's own death." *Compassion in Dying II*, 79 F.3d at 816 (footnote omitted, insert added). Such a reading of *Cruzan* assumes far too much. It is error to attempt to construe *Cruzan's* limited assumption of an interest to refuse medical treatment as acceptance by this Court of a far broader interest to commit suicide and, broader still, assisted suicide. Indeed, the error of such an attempt is plainly evidenced by the majority's recognition in *Cruzan* that, even in the face of a right to refuse medical treatment, the States may properly assert important interests in the protection and preservation of human life, and in the prevention of both suicide and assisted suicide. *Cruzan*, 497 U.S. at 280-282. In summary, suicide and assisted suicide are so significantly different from the refusal of unwanted medical treatment, and its legal underpinnings, that an interest in committing suicide or assisted suicide simply cannot be inferred from *Cruzan*.[28]

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[28] Unlike suicide, "[t]he right to refuse medical treatment meets the 'ordered liberty' and the 'historical underpinnings' tests because it is rooted in the common-law doctrine of informed consent, which embodies the notion of bodily integrity." *People v. Kevorkian*, 447 Mich. 436, 480 n.59, 527 N.W.2d 714, 732 n.59 (1994), *cert. denied*, 115 S.Ct. 1795 (1995).

II. Certiorari Should be Granted to Decide Whether the "No Set of Circumstances" Test Described in *United States v. Salerno*, 481 U.S. 739 (1987), Applies To A Facial Challenge To A State Statute Prohibiting Assisted Suicide

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court, summarizing a well-established principle of American jurisprudence, stated that:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*, at 745.

Prior to *Casey*, this Court had applied the test set out in *Salerno* to facial challenges to abortion laws.[29] However, the decisions of the circuit courts subsequent to *Casey* have split on the question of whether *Casey*, without even mentioning the "no set of circumstances" rule, has overruled *Salerno* for facial challenges to abortion statutes.[30]

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[29] *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); and *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment) ("[S]ome quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional.").

[30] *See Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (Fifth Circuit rejecting facial challenge to the Mississippi Informed Consent to Abortion Act and refusing to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes."), *cert. denied*, 113 S.Ct. 1656 (1992); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (Eighth Circuit expressing belief that Supreme Court

The question squarely presented in this case is whether *Salerno* remains good law even outside the abortion context. In the instant case, Doe challenged § 401 only "on its face"; he did not challenge the statute "as applied." App. at 8a, n.2. The critical issue is thus what is the standard for Doe's facial challenge to § 401? It cannot be seriously disputed that some obviously straightforward applications of § 401 are clearly constitutional, *e.g.*, to prevent suicide by teenagers or suicide caused by undue influence or duress. Indeed, in the case below Doe did not even attempt to demonstrate that there is no set of circumstances under which California's prohibition of assisted suicide would be valid. Even the Ninth Circuit has acknowledged that "some prohibitory .-. . . state action is fully consistent with constitutional principles" (*Compassion in Dying II*, 79 F.3d at 816) and that a State "has a clear interest in preventing anyone, no matter what age, from taking his own life in a fit of desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated." *Id.*, at 820. Had the District Court not declined to apply the *Salerno* rule to Doe's facial challenge, plainly it would have failed.

In declining to apply *Salerno*, the District Court relied upon a law review article and recent statements by the Ninth Circuit in *Compassion in Dying II* that " 'the *Salerno* test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition of assisted suicide.' "[31] App. at 9a-10a, further citation omitted. However, circuit courts continue to

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"effectively overruled *Salerno* for facial challenges to abortion statutes."), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S.Ct. 1582 (1996). *See also Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 863 n.21 (3rd Cir. 1994) (Third Circuit expressing belief, albeit in dictum, that *Salerno* has been overruled by *Casey*).

[31] This Court has admonished lower courts to follow its precedents that have direct application, unless and until they are formally overruled. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

regularly apply the *Salerno* test outside the abortion context, and its application often prevents facial challenges from succeeding.[32]

The question of whether *Salerno* remains good law even outside the abortion context could not be more squarely presented. Neither the States nor the courts should have to guess whether *Salerno* continues to represent the Law of the Land or, as some have suggested, it is now nothing more than a dead letter.[33]

III. Certiorari Should be Granted to Decide Whether the Undue Burden Standard Described in *Casey*, or the Balancing Test Employed by the Court in *Cruzan*, Applies to Determine Whether Respondent's Alleged Liberty Interests to Commit Suicide and Assisted Suicide Have Been Violated

1. Application of *Casey's* Undue Burden Standard Improperly Eliminates Any Consideration Of the Relevant State Interests Which Are Furthered by the Challenged Statute

The District Court's application of the undue burden standard to test the constitutionality of California's absolute

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[32] *See, e.g., Chemical Waste Management, Inc. v. United States Environmental Protection Agency*, 56 F.3d 1434, 1437 (D.C. Cir. 1995); *United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989); *National Treasury Employees Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989); *Jordan v. Jackson*, 15 F.3d 333, 343-344 (4th Cir. 1994); and *Guisto v. INS*, 9 F.3d 8, 10 (2d Cir. 1993). *See also Dean v. McWherter*, 70 F.3d 43, 45 (6th Cir. 1995) (*citing Salerno's* "no set of circumstances" test but finding plaintiffs had failed to establish liberty interest sufficient to trigger due process protections, thus, no need to apply *Salerno*).

[33] The pressing need for clear direction from this Court is further illustrated by the Ninth Circuit's recent amending of an opinion based on statements from a single Justice regarding *Salerno* contained in a separate memorandum regarding a denial of certiorari. *See Roulette v. City of Seattle*, ___ F.3d ___, ___, 1996 U.S. App. LEXIS 24343 (amended opinion on denial of rehearing) (9th Cir. 1996), *citing* memorandum of Justice Stevens regarding denial of certiorari in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S.Ct. 1582, 1583 (1996), and

prohibition of assisted suicide was error. The undue burden standard is a test designed to determine the extent to which a State may *regulate* particular conduct which it may not constitutionally *prohibit*.[34] It does not provide a means for testing the constitutionality of a statute that prohibits particular conduct.[35] Rather, the focus of the undue burden standard is whether a State has gone too far in regulating conduct it cannot prohibit. In short, application of the undue burden standard necessarily presumes that there is no state interest strong enough to support a prohibition of the particular conduct at issue.

By applying the undue burden standard in the case below, the District Court thus invalidated § 401 without ***any*** consideration whatsoever of the relevant state interests furthered by the statute. App. at 11a. In doing so, the District Court erroneously concluded that "Cal. Penal Code § 401 places a 'substantial obstacle' in a 'large fraction of the cases' in which the section is relevant." App. at 11a. The District Court

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amending previous opinion (78 F.3d 1425, 1430) on the basis of statements contained therein.

[34] *See, Casey*, 505 U.S. 833, 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus") (joint opinion of O'Connor, Kennedy and Souter, JJ.); 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability") (joint opinion of O'Connor, Kennedy and Souter, JJ.).

[35] *See Casey*, 505 U.S. 833, 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a *nonviable fetus*.") (joint opinion of O'Connor, Kennedy and Souter, JJ., emphasis added), *and Id.*, at 879 ("reaffirm[ing] *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, *and even proscribe*, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' ") (joint opinion of O'Connor, Kennedy and Souter, JJ., citation omitted, emphasis added).

reached this conclusion from "the fact that § 401 does not merely place some restrictions on the right to assisted suicide, but *categorically prohibits all such conduct.*" *Id.*; emphasis original. What the District Court failed to recognize, however, was that Doe's challenge to § 401 was a ***facial*** challenge. As a result, the " 'large fraction of the cases' in which the section is relevant" consists of ***all*** cases in which the statute operates to prevent suicide and assisted suicide, including, *e.g.*, teenage suicide attempts and those who seek to commit suicide in a fit of "desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated." *Compassion in Dying II*, 79 F.3d at 820. The District Court completely failed to carry out the calculation in *Casey* to show that in a "large fraction of cases" the statute would operate unconstitutionally. In fact, no statistics were cited by the District Court at all. Had the District Court actually compared the number of persons whose lives are protected by § 401 against the number of persons in Doe's situation, based on the evidence before it, the District Court would have concluded that § 401 does not constitute an undue burden in the "large fraction of the cases" in which the section is relevant. The District Court's facial invalidation of § 401 was thus completely unwarranted.

2. When Properly Balanced, Relevant State Interests Clearly Outweigh Alleged Liberty Interests in Suicide and Assisted Suicide

Instead of *Casey's* undue burden standard, the District Court should have employed the balancing test described by this Court in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Under that test, in order to determine whether California's prohibition of assisted suicide violates the Due Process Clause, the asserted interests in suicide and assisted suicide must be balanced against relevant state interests. *Cruzan*, 497 U.S. at 279. The wide range of circumstances within which the alleged interests to commit suicide and assisted suicide could be exercised implicate several important state interests, including, but not limited to: (1) the

protection and preservation of human life;[36] (2) the prevention of suicide;[37] (3) preventing the fraud, errors and abuse which would accompany acceptance of suicide and assisted suicide;[38] (4) maintaining the ethical integrity of the medical profession;[39] (5) protecting the poor and minorities from

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[36] *Cruzan*, 497 U.S. at 280.

[37] "Suicide is the eighth leading cause of death in the United States." *New York State Task Force Report*, at 9 (footnote omitted). "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." *Id.*, at 11. Furthermore, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.*, at 13 (footnote omitted).

[38] *Cruzan*, 497 U.S. at 281 ("[E]ven where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations. [citation omitted, internal quotes omitted]"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end.").

[39] *Cf. Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (important state interest in "maintaining and assuring the professional conduct of professional attorneys it licenses"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1620, 4 Cal.Rptr.2d 59, 62 (1992) (recognizing state interest in maintaining the ethical integrity of the medical profession). In reaffirming its long-standing opposition to physician assisted suicide, the American Medical Association has declared that physician-assisted suicide "threatens the very core of the medical profession's ethical integrity" and is "fundamentally inconsistent with the physician's professional role." American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2 (July 1994), Report 59, *Physician-Assisted Suicide*, 269 and 274, respectively.

exploitation;[40] (6) protecting handicapped persons from societal indifference;[41] and (7) protecting innocent third parties.[42]

In *Compassion in Dying II*, the Ninth Circuit acknowledged, at least to some extent, some of these interests. However, its application of the balancing test was fundamentally flawed by the improper insertion of quality-of-life considerations which it used to discount the strength of various important state interests.[43] Such quality-of-life considerations are directly contrary to this Court's holding in *Cruzan* that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[44] *Cruzan*, 497 U.S. at 282.

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[40] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[41] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[42] *Application of President & Directors of Georgetown College, Inc.*, 118 U.S.App.D.C. 80, 331 F.2d 1000, 1008 (1964), *cert. denied*, 377 U.S. 978 (1964). *See also Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 n.6, 209 Cal.Rptr. 220, 225 n.6 (1984).

[43] *Compassion in Dying II*, 79 F.3d at 817 (strength of the state's important interest in the preservation of human life "is dependent on relevant circumstances, including the medical condition and the wishes of the patient whose life is at stake."); *Id.*, at 820 (state interest in preventing suicide, "like the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die. [footnote omitted]"); *Id.*, at 825 (state interest in preventing involvement of third persons at a minimum "when the assistance is provided by or under the supervision or direction of a doctor and the recipient is a terminally ill patient."); and *Id.*, at 827 (state interest in protecting innocent third parties "is of almost negligible weight when the patient is terminally ill and his death is imminent and inevitable.").

[44] The dangers inherent in using such quality-of-life considerations are well-recognized. "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 422 (Mo. banc 1988), *aff'd sub nom. Cruzan*

When properly weighed, without the insertion of improper quality-of-life considerations, the State's interests, individually and collectively, clearly outweigh any individual interests in committing suicide and assisted suicide.

CONCLUSION

For all the foregoing reasons, petitioner Daniel E. Lungren, Attorney General of the State of California, respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Such an analysis also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law. *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring), citing *Blackburn v. State*, 23 Ohio St. 146, 163 (1873).

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACK KEVORKIAN, M.D., and JOHN DOE, Plaintiffs, v. DIXON ARNETT, AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA; MEDICAL BOARD OF CALIFORNIA; AND DANIEL E. LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants.	CV-94-6089 CBM (Kx) ORDER [Filed September 11, 1996] [Entered September 13, 1996]

This matter is before the Court on cross-motions for summary judgment filed by each remaining party to this action: Plaintiff Jack Kevorkian, M.D.; Plaintiff John Doe; and Defendant Daniel E. Lungren. The Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding, has considered the motion papers, counsel arguments, and the evidence, and based thereupon, issues the following order:

THE REMAINING PARTIES

1. Plaintiff John Doe

John Doe is 35 years old and was first diagnosed as HIV positive in July, 1984. He was diagnosed as having AIDS on January 1, 1993. John Doe is in the advanced final stages of his disease and has been advised by his physician that his condition is terminal, though the exact amount of time left to him is necessarily an estimate. John Doe currently suffers from a T-cell count of 12 (normal being about 1000), leading to chronic fatigue. He also suffers from several as yet undiagnosed viruses which his immune system lacks the ability to defeat. Recently, John Doe has been diagnosed as suffering from cytomegalovirus retinitis and has a catheter in his right arm for its treatment. However, this is a progressive degenerative disease of the optic nerve and will eventually destroy plaintiff's eyesight, preventing him from practicing his profession as a video editor.

John Doe is mentally competent and aware of the nature of his diseases and likely progress. In addition, John Doe contends that he has "seen his peers die without dignity and in horrible pain, and he does not want that fate to befall him." (Complaint, p. 22, ¶ 52.) John Doe wishes to obtain physician aid in dying.

2. Dr. Jack Kevorkian, M.D.

Dr. Kevorkian was issued California Physicians and Surgeons certificate No. C19165 on November 18, 1957. Dr. Kevorkian's medical license, however, was revoked on June 29, 1994 in default proceedings based on the fact that (1) he had been disciplined by the Michigan Board of

Medicine and (2) he had assisted five patients to commit suicide.

On September 7, 1994, Dr. Kevorkian filed a petition for writ of administrative mandamus in the Los Angeles County Superior Court, seeking judicial review of the default decision. The Superior Court dismissed with leave to amend on the grounds that Dr. Kevorkian had neither exhausted his administrative remedies nor alleged that it was futile to do so. Dr. Kevorkian has appealed the ruling.

3. Attorney General Daniel E. Lungren

Attorney General Lungren is the chief law enforcement officer in the State of California. He possesses discretion to initiate criminal prosecutions and general supervisory powers over the district attorneys in the state.

CALIFORNIA'S STATUTE PROHIBITING ASSISTED SUICIDE

California law does not criminalize suicide. *In re Joseph G.* 34 Cal. 3d 429 (1983). California law also permits an individual to refuse or require the withdrawal of life-sustaining treatment. *Bouvia v. Superior Court,* 179 Cal. App. 3d 1127 (1986), *review denied,* (June 5, 1986) (competent individuals have a right to refuse medical treatment that sustains life); *see also People v. Adams* 216 Cal. App. 3d 1431 (1990), *review denied,* (April 19, 1990) (a person has a constitutionally protected interest in refusing unwanted medical treatment or procedures). This right to refuse

treatment or life-sustaining measures has not been limited to those who are terminally ill. *See Bartling v. Superior Court*, 163 Cal. App. 3d 186 (1984) (seriously ill patient may refuse treatment).

However, California law criminalizes those who aid a person in committing suicide. Cal. Penal Code § 401 states:

> Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.

QUESTIONS PRESENTED

These cross-motions for summary judgment have been brought on numerous grounds: (1) whether Plaintiffs lack standing to assert their claims; (2) whether Eleventh Amendment immunity applies; (3) whether Cal. Penal Code § 401 facially violates the Due Process Clause of the Federal Constitution; (4) whether Cal. Penal Code § 401 violates the Equal Protection Clause of the Federal Constitution; (5) whether Cal. Penal Code § 401 violates the right to privacy under the California Constitution; and (6) whether Cal. Penal Code § 401 violates the Equal Protection Clause of the California Constitution.

ANALYSIS

1. STANDING

The Court will address first the Attorney General's challenge to Plaintiffs' standing. The Court finds that John Doe has standing but that Dr. Jack Kevorkian does not.

As required by Article III of the United States Constitution, this Court must determine at the threshold whether Plaintiffs present an "actual controversy." *Steffel v. Thompson*, 415 U.S. 452, 468-69 (1974). A patient may challenge the constitutionality of a statute criminalizing the conduct of the physician even though the patient is not the direct object of the criminal statute. *Roe v. Wade*, 410 U.S. 113 (1973); *see also, Idaho Farm Bureau Federation v. Babbit*, 58 F.3d 1392 (9th Cir. 1995); *National Wildlife Federation v. Espy*, 45 F. 3d 1337 (9th Cir. 1995). Moreover, after examining the pleadings and evidence, this Court concludes that Plaintiff John Doe has standing to challenge the constitutionality of the statute because the Attorney General has not stated affirmatively that his office will not enforce the statute. *See Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (although Attorney General has never enforced a civil statute, without affirmative denial of enforcement plaintiff has standing). Thus, John Doe has standing to bring this action even though he is not the direct object of Cal.Penal Code § 401.

As a general principle, physicians have been found to have standing to assert the rights of their patients because of the special nature of the physician-patient relationship. *See e.g., Doe v. Bolton*, 410 U.S. 179, 188 (1973) (physician may assert rights of patient in abortion context). Thus, although courts recognize that the actual right asserted resides with the patient, physicians have standing to assert the rights of their patients challenging the constitutionality of a criminal physician-assisted suicide statute even though they have not been prosecuted, or threatened with prosecution, for violation of the statute. *Compassion in Dying v. State of Washington*, 79 F.3d 790

(9th Cir. 1996), *stay granted, Washington v. Glucksberg*, 116 S. Ct. 2494 (June 10[,] 1996) (No. A-974), *reh'g en banc by full court denied, Compassion in Dying v. State of Washington*, 85 F.3d 1440 (June 12, 1996) (No. 94-35534), *cert. filed*, 65 U.S.L.W. 3085 (Jul. 03, 1996) (No. 96-110); *see also Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994). Dr. Kevorkian, however, is not licensed to practice in the State of California. Thus, he does not have standing to challenge the constitutionality of Cal. Penal Code § 401 as a physician.[1]

Although Dr. Kevorkian and John Doe both challenge the constitutionality of Cal. Penal Code § 401 under federal and state law, their claims relative to this statute differ according to their circumstances: John Doe asserts the right to receive medical assistance from a physician in committing suicide; Dr. Kevorkian asserts claims on behalf of his patients to medically assisted suicide and also his own right to practice medicine. To the extent, then, that Dr. Kevorkian's and John Doe's claims vary, this Court will only reach those claims asserted by John Doe.

2. ELEVENTH AMENDMENT IMMUNITY

Eleventh Amendment immunity "may be raised at any point in a proceeding." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) *citing, Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459,

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[1] While the California statute more broadly criminalizes the actions of *anyone* who assists another in committing suicide, Dr. Kevorkian's claims as set forth in the Second Amended Complaint challenge the statute as a physician and on behalf of his patients.

467 (1945). It is, therefore, proper that this Court analyze Defendant's immunity claims at this time.

The Eleventh Amendment bars federal courts from entertaining suits brought by a private party against a state or its instrumentalities in the absence of state consent. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 950 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). However, the Eleventh Amendment does not bar actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities. *Ex Parte Young*, 209 U.S. 123 (1908); *Long v. Van de Kamp*, 961 F.2d 151 (1992). The claims in this action fall squarely within this exception to Eleventh Amendment immunity.

Under *Ex Parte Young*, the state officer sued "must have some connection with the enforcement of the [allegedly unconstitutional] act." *Id.* at 157. Lungren argues that as the Attorney General he does not have sufficient connection to the enforcement of Cal. Penal Code § 401 because he only has "general supervisory powers" over the district attorneys under Cal. Gov't Code §§ 12550, *et seq.*, and 26501.

California Government Code § 12550, however, gives the Attorney General more than supervisory powers. Section 12550 provides that:

> The Attorney General has direct supervision over the district attorneys . . . and may require of them written reports as to the condition of public business entrusted to their charge.
>
> When he deems it advisable or necessary in the public interest, or when directed to do so by

> the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, *take full charge* of any investigation or *prosecution* of violations of law of which the superior court has jurisdiction. In this respect *he has all the powers of a district attorney*, including the power to issue or cause to be issued subpoena or other process.

(emphasis added) Cal. Gov't Code § 12550.

Because the Attorney General has all the powers of a district attorney in prosecuting violations of law, he has sufficient connection with the enforcement of Cal. Penal Code § 401. Thus, the Court finds that this action is not barred by the Eleventh Amendment.

3. DUE PROCESS CLAUSE OF FEDERAL CONSTITUTION:

This Court has been asked to determine whether there is a constitutional right to assisted suicide found under the liberty interest of the Due Process Clause of the Federal Constitution and whether that right is "facially"[2] violated by Cal. Penal Code § 401.[3]

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[2] Plaintiff does not challenge the statute "as applied."

[3] Upon further reconsideration of the Ninth Circuit's *en banc* opinion in *Compassion in Dying*, this Court determines that the relevant constitutional inquiry is whether Plaintiff's due process *liberty* interest is violated. Plaintiff is granted leave to amend the complaint to conform to this change.

a. Protected liberty interest:

The Ninth Circuit has recently acknowledged a protected Fourteenth Amendment liberty interest "in controlling the time and manner of one's death." *Compassion in Dying*, 79 F.3d at 816. This liberty interest stems from the right of an individual to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 813, *citing Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). In other words, decisions as to when and how to end one's life, like those personal decisions involving abortion, are "the most intimate and personal choices a person may make in a lifetime . . . [choices] central to personal dignity and autonomy." *Id.* at 813-14.

b. Standard of review

The standard of review generally applied to facial challenges was announced in *U.S. v. Salerno*, 481 U.S. 739 (1987). The test set forth requires a plaintiff to demonstrate that "no set of circumstances exists under which the [law] would be valid." *Id.* at 745.

Notwithstanding this apparently straightforward standard, courts and commentators have become increasingly cognizant of the Court's deviation from this requirement. *See* Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994). Although the Ninth Circuit's opinion in *Compassion & Dying* dealt with an "as applied" constitutional challenge to the Washington statute in question, the court nonetheless agreed that the Supreme Court has not consistently applied the *Salerno* test in cases involving abortion: "it is

clear that [the Supreme Court] has applied a different test for judging the constitutionality of statutes restricting a woman's right to secure an abortion." *Compassion in Dying*, 79 F.2d at 798 n.9. Further, the Ninth Circuit stated that it did not believe the *Salerno* test to be applicable to a facial challenge involving Washington's statute: "Since the claimed liberty issue in this case is in many respects similar to the liberty issue involved in *Casey*, . . . , we believe that the *Salerno* test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition on assisted suicide." *Id.*[4]

In *Casey*, Justices O'Connor, Kennedy and Souter announced that a facial challenge to a statute regulating abortion was to be analyzed by reference to an "undue burden" standard. *Casey*, 505 U.S. at 876. Under this test, a statute constitutes an undue burden if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.[5] The Court explained that this test was "a standard of general application to which we intend to adhere." *Id.* at 876.

This Court agrees with the Ninth Circuit's analysis in *Compassion in Dying* and finds the *Salerno* test to be inapplicable to the facial challenge to Cal. Penal Code § 401.

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[4] The district court in *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wa. 1994) also held that *Salerno* was not applicable to the facial challenge before it.

[5] Justices O'Connor and Souter reaffirmed the applicability of the "undue burden" test in *Fargo Women's Health Organization v. Schafer*, 113 S. Ct. 1668, 1669 (1993).

Given the similarity between the liberty interests in abortion and assisted suicide, the test announced in *Casey* more closely addresses the constitutional question at issue. Both liberty interests involve decisions that are "central to personal dignity and autonomy," *Casey*, 505 U.S. at 851, and implicate the right to be "free from unwarranted government intrusion into matters . . . fundamentally affecting a person." *Id.* at 875, *quoting Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

c. Undue burden

In *Casey*, the Court found that Washington's spousal notification provision relating to abortion constituted an "undue burden" although the statute may have only applied to fewer than one percent of women seeking abortions. *Casey*, 505 U.S. at 894. Applying this standard, it is clear that Cal. Penal Code § 401 places a "substantial obstacle" in a "large fraction of the cases" in which the section is relevant. This conclusion is readily apparent by the fact that § 401 does not merely place some restrictions on the right to assisted suicide, but *categorically prohibits all such conduct*. Accordingly, this Court finds that Cal. Penal Code § 401 violates the Due Process Clause of the Federal Constitution.

4. EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION:

Plaintiff also asserts that Cal. Penal Code § 401 denies him equal protection of the law as guaranteed by the United States Constitution because California state law unconstitutionally distinguishes between two similarly

situated groups of mentally competent, terminally ill patients. For the reasons outlined below, this Court declines to render an opinion as to the parties' federal equal protection claims at this time.

First, the Ninth Circuit in *Compassion in Dying* declined to address the parties' claims under the Equal Protection Clause, finding "[o]ne constitutional violation is enough to support the judgment that is reached here." *Compassion in Dying*, 79 F.3d at 838. Second, two district courts within the Ninth Circuit have analyzed the equal protection issue in the assisted-suicide context and rendered contradictory rulings. *Compare Compassion in Dying*, 850 F. Supp. 1454 (W.D. Wa. 1994) (applying strict scrutiny standard, court finds violation of Equal Protection Clause) *with Lee v. State of Oregon, supra,* (applying rational relation test). Given the volatility and complexity of these constitutional issues and the fact that Ninth Circuit has recently heard oral argument in the appeal of *Lee v. State of Oregon*, 891 F. Supp. 1429 (D. Or. 1995), *see Compassion in Dying, denial of rehearing en banc* (dissenting opinion), this Court declines to contribute to the growing confusion in this area of law in the Ninth Circuit and awaits guidance from the Circuit.

Finally, the parties suggest that this court look to the Second Circuit ruling in *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), for guidance as to this issue. However, because, in contrast to this Circuit's findings, the Second Circuit has found that competent adult patients do not have a fundamental substantive due process right to physician-assisted suicide, this Court finds *Quill v. Vacco* to be inapplicable.

5. PRIVACY UNDER THE CALIFORNIA CONSTITUTION

This Court has been asked to determine whether Cal. Penal Code § 401 facially violates John Doe's right to privacy under the California Constitution, Article 1, Section 1.

It is a well-established principle of federalism that in deciding questions of state law, where there is no determinative case law from the California Supreme Court, a federal court must use its best judgment to "ascertain how that Court would decide the issue." *General Motors Corp. v. Doupnik*, 1 F.3d 862 (9th Cir. 1993). In doing so, a federal court may not disregard state appellate court decisions unless it is convinced by other persuasive data that the highest court of the state would decide the issue differently. *See Miller v. County of Santa Cruz*, 39 F.3d 1030, *as amended* (December 27, 1994), *cert. denied*, 115 S. Ct. 2613 (1994); *see also Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *opinion modified on denial of rehearing*, 810 F.2d 1517 (1987).

Although the California Supreme Court has not directly addressed the question of whether California's right to privacy encompasses a right to assisted suicide, one appellate court has expressly held that it does not. In *Donaldson v. Lungren*, 2 Cal. App. 4th 1614 (1992), the California Court of Appeal for the Second District engaged in a balancing of the competing concerns and held that "We cannot expand the nature of Donaldson's right to privacy to provide a protective shield for third

persons who end his life." *Id.* at 1622.[6] Similarly, in *Thor v. Superior Court*, 5 Cal. 4th 725 (1993), the California Supreme Court, citing *Donaldson*, found a "necessary distinction" between one who refuses medical treatment and one who deliberately enlists others to assist in a suicide. *Id.* at 742.[7]

Without expressing any opinion on the reasoning in *Donaldson*, this Court is nonetheless compelled to find that there is no persuasive authority to believe that the California Supreme Court would hold otherwise if directly presented with the issue. Thus, until a clear determination is made by the highest court of the state, this Court finds based on principles of federalism that California's right to privacy does not include a right to assisted suicide.

6. EQUAL PROTECTION UNDER CALIFORNIA LAW

Finally, Plaintiff contends that California's inconsistent treatment of the terminally ill violates John Doe's right to equal protection of the laws under the California Constitution. "California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal

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[6] The court in *Donaldson* was specifically asked to decide whether Cal. Penal Code § 401 was violative of California's right to privacy.

[7] Several other appellate courts have also explicitly distinguished suicide from the refusal of unwanted medical treatment. *See e.g. People v. Adams*, 216 Cal. App. 3d 1431, 1440 (1992); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 196 (1984).

protection clause." *Graham v. Kirkwood Meadows Pub. Util. Dist.*, 21 Cal. App. 4th 1631, 1642 (1994). Under this test, strict scrutiny is applied in cases involving suspect classifications or fundamental rights; rational basis analysis is applied to all other cases. *Id.* Given this Court's previous findings that California's right to privacy does not encompass a right to assisted suicide, Cal. Penal Code § 401 does not create a suspect classification or implicate a fundamental right under the California Constitution.

Consequently, the inquiry under the rational basis test is whether the § 401 bears "some rational relationship to a conceivable legitimate state purpose." *Id.* at 1646, *quoting Newland v. Board of Governors*, 19 Cal. 3d 705, 711 (1977). Applying this test, the Court finds that the interests articulated by the state constitute a sufficient basis to overcome Plaintiff's equal protection challenge.

BASED ON THE FOREGOING, this Court hereby dismisses Plaintiff Jack Kevorkian from this action for lack of standing. Plaintiff Jack Kevorkian's motion is therefore moot. Plaintiff John Doe's motion for summary judgment is hereby GRANTED as to the federal due process claim and DENIED as to the California claims. Accordingly, Defendant Lungren's motion is DENIED as to the federal due process claim and GRANTED as to the California claims.

IT IS SO ORDERED.

Dated: 9/11/96

/s/ Consuelo B. Marshall
CONSUELO B.
MARSHALL
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JACK KEVORKIAN, M.D., and JOHN DOE, Plaintiffs, v. DIXON ARNETT, AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA; MEDICAL BOARD OF CALIFORNIA; AND DANIEL E. LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants.	Case No. CV-94-6089 CBM (Kx) JUDGMENT [Filed September 19, 1996] [Entered September 20, 1996]

Pursuant to 28 U.S.C. section 2201 *[& consistent with courts order filed 9/11/96 CBM (bracket material added by court)]*, declaratory judgment is hereby entered in favor of plaintiff John Doe as follows: California Penal Code section 401 is unconstitutional on its face because it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Judgment is also hereby entered in favor of defendant Daniel E. Lungren, Attorney General of the State of California, as follows:

(1) As to plaintiff Jack Kevorkian on the grounds that he lacks standing as required by Article III of the United States Constitution;

(2) On plaintiff John Doe's right to privacy claim under the California Constitution on the grounds that the right to privacy under Article I, Section 1, of the California Constitution does not include a right to assisted suicide; and

(3) On plaintiff John Doe's equal protection claim under the California Constitution on the grounds that California Penal Code section 401 does not deny equal protection of the laws as guaranteed by the California Constitution.

Entered at Los Angeles, California, this 19 day of Sept, 1996.

/s/ Consuelo B. Marshall
HONORABLE
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

Presented by:

DANIEL E. LUNGREN, Attorney General
of the State of California
THOMAS S. LAZAR,
Deputy Attorney General

By /s/ Thomas S. Lazar
THOMAS S. LAZAR
Deputy Attorney General
Attorneys for Defendants

LAWRENCE SILVER & ASSOCIATES
Lawrence Silver, Esq. (SBN 68604)
Mark E. Field, Esq. (SBN 76384)

By /s/ Mark W. Field
MARK E. FIELD, ESQ.
Attorneys for Plaintiffs

APPENDIX C

DANIEL E. LUNGREN, Attorney General
of the State of California
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JACK KEVORKIAN, M.D., and JOHN DOE, Plaintiffs, v. DIXON ARNETT, AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA; MEDICAL BOARD OF CALIFORNIA; AND DANIEL E. LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants.	Case No. CV-94-6089 CBM (Kx) STIPULATION OF THE PARTIES TO THE GRANTING OF AN ORDER STAYING ENFORCEMENT OF FINAL JUDGMENT; AND STAY ORDER (F.R.C.P., Rule 62(h)) [Filed September 19, 1996] Date: None Time: None Courtroom 11 Honorable Consuelo B. Marshall

The parties in the above-entitled matter, by and through their respective attorneys of record, hereby request and stipulate, subject to the approval of this Court, as follows:

1. That this Court issue an order staying enforcement of the final judgment to be entered, as requested by the parties in their Joint Motion for Entry of Final Judgment, and as ordered by this Court in its Order directing Entry of Final Judgment under Rule 54(b) of the Federal Rules of Civil Procedure, in the above-entitled matter;

2. That said stay shall remain in full force and effect until the conclusion of appellate proceedings in the United States Court of Appeals for the Ninth Circuit and/or review proceedings in the Supreme Court of the United States, if any; and

3. Nothing herein shall be construed as a waiver by plaintiff John Doe of his right to apply to this Court in the future for relief from this stay order in the event that circumstances so require.

Dated: September 18, 1996. I concur with the above stipulation.

DANIEL E. LUNGREN,
Attorney General
of the State of California
THOMAS S. LAZAR,
Deputy Attorney General
By /s/ Thomas S. Lazar
THOMAS S. LAZAR
Deputy Attorney General
Attorneys for Defendants

Dated: September 19, 1996. I concur with the above stipulation.

LAWRENCE SILVER &
ASSOCIATES
Lawrence Silver, Esq. (SBN 68604)
Mark E. Field, Esq. (SBN 76384)

By /s/ Mark E. Field
MARK E. FIELD, ESQ.
Attorneys for Plaintiffs

IT IS SO ORDERED.

Dated: 9/19/96

CONSUELO B. MARSHALL
HONORABLE
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

DANIEL E. LUNGREN, Attorney General of the
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JACK KEVORKIAN, M.D., and JOHN DOE, Plaintiffs, v. DIXON ARNETT, AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA; MEDICAL BOARD OF CALIFORNIA; AND DANIEL E. LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants.	Case No. CV-94-6089 CBM (Kx) NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [Filed September 25, 1996]

Notice is hereby given that Daniel E. Lungren, Attorney General of the State of California, defendant in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment

of the district court entered in this action on September 20, 1996. A copy of said judgment is attached hereto.

Pursuant to Local Rule 17 of the United States District Court for the Central District of California, the names of all parties to the judgment, and the names and addresses of the attorneys for each party, are as follows:

Plaintiffs/Appellees

Jack Kevorkian, M.D.,
and John Doe

Represented By

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Lawrence Silver, Esq.
Lawrence Silver & Associates
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Defendant/Appellant

Daniel E. Lungren,
Attorney General of the
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Represented By

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Telephone: (619) 645-2117
Facsimile: (619) 645-2061

Dated: September 23, 1996.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
THOMAS S. LAZAR,
Deputy Attorney General

By /s/ Thomas S. Lazar
THOMAS S. LAZAR
Deputy Attorney General
Attorneys for Defendants

TSL/

APPENDIX E

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
121 Spear Street, P.O. Box 193939
San Francisco, CA 94119-3939

October 2, 1996

U.S. Court of Appeals Docket Number: 96-56405
Lower Court Docket No.: CV-94-06089-CBM(Kx)
Short Title: Kevorkian v. Lungren

Dear Counsel:

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeal docket number when corresponding with this office relative to your case. Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

THE DUE DATES FOR DESIGNATING AND FILING THE REPORTER'S TRANSCRIPT, IF APPLICABLE, FILING THE PARTIES' BRIEFS AND OTHERWISE PERFECTING THE APPEAL HAVE BEEN SET BY THE ENCLOSED "TIME SCHEDULE ORDER", PURSUANT TO APPLICABLE FRAP RULES. THESE DATES CAN BE EXTENDED ONLY BY COURT ORDER. FAILURE OF THE APPELLANT TO COMPLY WITH THE TIME SCHEDULE ORDER WILL RESULT IN AUTOMATIC DISMISSAL OF THE APPEAL.

The following information is being provided in an attempt to answer the most frequently asked questions regarding the appellate process. Please review this information very carefully. For convenience, the term "Circuit Rules" will be used for "Rules of the United States Court of Appeals for the Ninth Circuit" and "FRAP" for "Federal Rules of Appellate Procedure" will be used throughout this document.

Enclosed with this letter is an appellate processing schedule along with a case processing checklist which may be attached to your case file as an aid in monitoring case progress.

APPELLANTS/PETITIONERS WHO ARE FILING PRO SE SHOULD REFER TO THE ACCOMPANYING INFORMATION SHEET REGARDING THE FILING OF INFORMAL BRIEFS.